

***United States Court of Appeals
for the Second Circuit***



JOINT APPENDIX

76-7469

United States Court of Appeals

FOR THE SECOND CIRCUIT

PRATT & WHITNEY, Division of
UNITED AIRCRAFT CORPORATION,

Plaintiff-Appellant,

—against—

BURLINGTON NORTHERN, INC.,

Defendant-Appellee.



ON APPEAL FROM A JUDGMENT OF THE UNITED STATES
DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

APPENDIX

SCHINDEL & COOPER

Attorneys for Plaintiff-Appellant
450 Seventh Avenue
New York, N. Y. 10001
(212) 244-6575

BLEAKLEY, PLATT, SCHMIDT & FRITZ

Attorneys for Defendant-Appellee
120 Broadway
New York, N. Y. 10005
(212) 732-2000

PAGINATION AS IN ORIGINAL COPY

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DOCKET ENTRIES
UNITED STATES DISTRICT COURT

DATE	FILINGS - PROCEEDINGS
Apr. 26, 1974	Filed complaint & issued summons.
May 8, 1974	Filed summons in a Civil Action & return - Served defendant 5/1/74.
June 13, 1974	Filed Stip. & Order that the time for defendant to answer is extended to 6/20/74, Owen, J.
June 28, 1974	Filed Answer.
Apr. 18, 1975	Filed plaintiff's affidavit & notice of motion for summary judgment - Ret. 5/9/75.
Apr. 18, 1975	Filed plaintiff's memorandum in support of motion for summary judgment.
July 11, 1975	Filed defendant's affidavit & notice of cross-motion for an order granting summary judgment to the defendant on the ground that there are no triable issues of fact, etc., as indicated. Returnable on 7/18/75.
July 11, 1975	Filed memo in support of defendant's motion for summary judgment etc., as indicated.
Sept. 4, 1975	Filed Reply memorandum in support of plaintiff's motion for summary judgment and in opposition to defendant's cross- motion for summary judgment.
Jan. 14, 1976	Filed Memo Endorsed on defendant's motion for summary judgment. Motion granted and the action is dismissed as time-barred. Submit judgment on notice...Owen, J. (mailed notice)

DATE	FILINGS - PROCEEDINGS
Jan. 14, 1976	Filed Memo Endorsed on plaintiff's motion for summary judgment. Motion denied. See Memorandum and Order on cross-motion this date ...Owen, J. (mailed notice)
Sept. 13, 1976	Filed Order & Judgment - Defendant's motion for summary judgment is granted and the complaint is dismissed on the merits... Owen, J. Judgment entered 9/13/76...Clerk.
Sept. 24, 1976	Filed plaintiff Pratt & Whitney appeal to the USCA from the final judgment of Sept. 13, 1976. (m/n)

COMPLAINT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- - - - - X

PRATT & WHITNEY AIRCRAFT, division :
of UNITED AIRCRAFT CORPORATION, :

Plaintiff :

COMPLAINT

-against- :

BURLINGTON NORTHERN, INC., :

Defendant :

- - - - - X

Plaintiff, by its attorneys, SCHINDEL & COOPER, as and for
its complaint against defendant, respectfully alleges as follows:

FIRST: This action arises under Section 20(11) of the
Interstate Commerce Act, 49 U.S.C. §20(11) (1970). The matter
in controversy exceeds, exclusive of interest and costs, the sum
of ten thousand dollars.

SECOND: On or about August 7, 1968, the Chicago, Burlington
& Quincy Railroad issued a Bill of Lading bearing shipper's
number 67-1507 to cover the transportation of two skids of elec-
tric generators and five boxes of electric generator motor parts
belonging to plaintiff. Said goods were entrusted to the Chicago,
Burlington & Quincy Railroad for transportation from Electric
Machinery Manufacturing Company in Minneapolis, Minnesota, to

COMPLAINT

Western Massachusetts Electric Company, West Springfield, Massachusetts.

THIRD: On or about August 13, 1968, the shipment described in the preceding paragraph was damaged while en route to the consignee.

FOURTH: As a result of the damage described in the preceding paragraph, plaintiff has incurred expenses in the sum of \$34,134.50.

FIFTH: At some time between August 7, 1968, the date of the shipment in question, and the present time, defendant became successor to the interests of the Chicago, Burlington & Quincy Railroad.

WHEREFORE, plaintiff demands judgment against defendant in the sum of \$34,134.50, together with interest from August 13, 1968, together with the costs and disbursements of this action and such other relief as the Court may deem just and proper.

DATED: New York, New York
April 25, 1974

Yours, etc.

SCHINDEL & COOPER
Attorneys for Plaintiff
450 Seventh Avenue
New York, N. Y. 10001
Tel. No. 244-6575

By: Hylan Cooper
HYLAN COOPER
Member of Firm

ANSWER

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- x

PRATT & WHITNEY AIRCRAFT, division of	:	
UNITED AIRCRAFT CORPORATION,	:	74 Civ. 1849
	:	
Plaintiff,	:	JUDGE R. OWEN
	:	
-against-	:	<u>ANSWER</u>
	:	
BURLINGTON NORTHERN, INC.,	:	
	:	
Defendant.	:	
	:	
	:	

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Defendant Burlington Northern Inc., by its attorneys Bleakley, Platt, Schmidt & Fritz, for its answer to the complaint herein alleges upon information and belief, as follows:

1. Admits the allegations contained in the paragraphs of the complaint designated "FIRST" and "FIFTH".

2. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraph of the complaint designated "SECOND", except admits that on or about August 7, 1968, the Chicago, Burlington & Quincy Railroad Company received a certain shipment from Electric Machinery Manufacturing Company in Minneapolis, Minnesota, for transportation over its lines and the lines of Penn

ANSWER

Central Transportation Company to Western Massachusetts Electric Company in West Springfield, Massachusetts, that upon its acceptance of such shipment it issued therefor its uniform bill of lading bearing shippers No. 67-1507, for construction of the terms of which it respectfully refers to such document itself, and that said shipment was described as consisting of two skids of electric generators and five boxes of electric generator motor parts.

3. Denies any knowledge or information sufficient to form a belief as to the truth of any of the allegations contained in the paragraphs of the complaint designated "THIRD" and "FOURTH".

FOR A FIRST, SEPARATE AND COMPLETE
DEFENSE TO EACH AND EVERY ALLEGED
CAUSE OF ACTION

4. Whatever shipments were received for transportation by the carriers were accepted in accordance with, and subject to, all of the terms and conditions of the uniform bill of lading prescribed by the Interstate Commerce Commission and also subject to the effective classifications and tariffs, the rules set forth therein, and the rules, regulations and practices of defendant and its connecting lines applicable thereto, including terminal tariffs, duly published and filed with said Commission which together formed the contract of carriage between the parties

ANSWER

for the transportation of said shipments and the responsibility of the carriers in the matter is defined by and subject to the provisions of the Interstate Commerce Act, the Bills of Lading Act and other Statutes of the United States of America applicable to shipments moving in Interstate Commerce. The defendant and its connecting carriers duly performed all of the terms, conditions and obligations on its and their part to be performed.

FOR A SECOND, SEPARATE AND COMPLETE DEFENSE TO EACH AND EVERY
ALLEGED CAUSE OF ACTION

5. That said bill of lading agreement contained a provision to the effect that the carrier or party in possession would not be responsible for any loss, damage or delay caused by the act or default of said shipper or owner and any loss, damage or delay to said shipment was due to such causes.

FOR A THIRD, SEPARATE AND COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

6. That said bill of lading agreement further provided that except in case of negligence of the carrier or party in possession, the carrier or party in possession would not be responsible for loss, damage or delay while the property was held in transit upon the request of the shipper or owner or resulting

ANSWER

from a defect or vice in the property and, if there was any loss, damage or delay to said shipments, it was through such causes without any negligence on the part of the carriers transporting the same, their agents or employees.

FOR A FOURTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

7. The shipments referred to in the complaint herein were loaded and counted by the shipper and/or its agent and the defendant is not responsible for any damage to such shipments caused by the improper loading thereof.

FOR A FIFTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

8. Among the terms and conditions of said bill of lading agreement was a provision to the effect that claim for loss or damage must be filed in writing within nine months of the shipment, or in the case of nondelivery within nine months of a reasonable time for such delivery, and that suit must be instituted within two years and one day from the date of a notice in writing by the carrier that the claim is disallowed. In the event that claim was not filed nor suit instituted on any of the

ANSWER

shipments that are the subject of the complaint herein within the described time limits, suit on such shipments is barred.

FOR A SIXTH, SEPARATE AND PARTIAL
DEFENSE TO EACH AND EVERY ALLEGED
CAUSE OF ACTION

9. Said shipments moved subject to any limitations of liability set forth in the applicable tariffs, classifications and supplements thereto in effect and filed with the Interstate Commerce Commission and any recovery by the plaintiff herein may not be in excess of such limitations.

FOR A SEVENTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

10. That in the event plaintiff had not nor has not any title or interest in the shipments that are the subject of this action then plaintiff is not the real party in interest herein and not entitled to maintain this suit.

FOR AN EIGHTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

11. This Court is a forum non conveniens for the trial and maintenance of this action, and the trial and maintenance of this suit here in such jurisdiction would constitute

ANSWER

an unnecessary and unreasonable burden on Interstate Commerce contrary to the mandate of Article 1, Section 8, Clause 3 of the Federal Constitution.

FOR A NINTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

12. During the times mentioned in the complaint the defendant railroad did not have and still does not have any rail lines within the Southern District of New York. To the extent the plaintiff in its complaint is suing said defendant as the delivering carrier of an interstate shipment, jurisdiction of the subject matter of the action is lacking pursuant to Section 20(11) of the Interstate Commerce Act, 49 U.S.C.A. Section 20(11).

FOR A TENTH, SEPARATE AND
COMPLETE DEFENSE TO EACH AND
EVERY ALLEGED CAUSE OF ACTION

13. The complaint fails to state a claim against defendant upon which relief can be granted.

WHEREFORE, defendant demands judgment dismissing the complaint herein as to it, together with its costs and disbursements in this action.

Dated: New York, N. Y.
June 20, 1974

ANSWER

BLEAKLEY, PLATT, SCHMIDT & FRITZ

By (Sgd.) Robert P. Shaughnessy
A Member of the Firm

Attorneys for Defendant
Office and P.O. Address
120 Broadway
New York, N. Y. 10005
(212) 732-2000

TO: SCHINDEL & COOPER
Attorneys for Plaintiff
450 Seventh Avenue
New York, N. Y. 10001

Plaintiff's Notice of Motion, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRATT & WHITNEY AIRCRAFT, division of
UNITED AIRCRAFT CORPORATION,

Plaintiff

-against-

BURLINGTON NORTHERN, INC.,

Defendant

NOTICE OF MOTION

FOR

SUMMARY JUDGMENT

Index No.

74 CIV. 1849

Judge R. Owen

SIRS:

PLEASE TAKE NOTICE, that upon the affidavit of HYLAN COOPER, duly sworn to the 17th day of April, 1975, hereto annexed, and upon all proceedings had herein, the undersigned will move this Court, at The United States Courthouse, located at Foley Square, New York, New York, on the 7th day of May, 1975, at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an order directing that Summary Judgment be entered in favor of plaintiff against defendant, as well as for the relief demanded in the complaint, and for such other and further relief as to the Court may seem just and proper.

Plaintiff's Notice of Motion, etc.

PLEASE TAKE FURTHER NOTICE, that pursuant to FRCP Rule 6 (d), affidavits to be used in answering this motion are required to be served on the undersigned at least five (5) days before the hearing.

Dated: New York, New York
April 17, 1975

Yours, etc.

SCHINDEL & COOPER
Attorneys for Plaintiff
Office and P.O. Address
450 Seventh Avenue
New York, NY 10001

To: BLEAKLEY, PLATT, SCHMIDT & FRITZ, ESQS.
Attorneys for Defendant
120 Broadway
New York, NY 10005

Plaintiff's Notice of Motion, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PRATT & WHITNEY AIRCRAFT, division of	:
UNITED AIRCRAFT CORPORATION,	:
	:
Plaintiff	: <u>Index No.</u>
	:
-against-	: 74 CIV. 1849
	:
BURLINGTON NORTHERN, INC.,	: Judge R. Owen
	:
Defendant	:
----- X	

STATEMENT OF FACTS

Pursuant to Rule 9(g) of the Rules of the United States District Court, Southern District of New York, plaintiff herewith submits a statement of the material facts of the cause of action as to which plaintiff contends there is no genuine issue to be tried.

On August 7, 1968, plaintiff prepared a joint through Bill of Lading bearing shipper's number 67-1507, covering the transportation of two skids of electric generators and five boxes of electric generator motor parts from Electric Machinery Manufacturing Company in Minneapolis, Minnesota to Western Massachusetts Electric Company, West Springfield, Massachusetts, designating Chicago, Burlington & Quincy Railroad (hereinafter referred to as CB&Q) as the originating carrier and Penn Central as the connecting and delivering carrier. This Bill of Lading was received for on August 7, 1968 by R. D. Sherve, agent of CB&Q, in Minneapolis.

On or about August 13, 1968, this shipment was damaged by fire while en route to the consignee. Inspection of the damaged shipment was made by CB&Q on August 21, 1968.

Plaintiff's Notice of Motion, etc.

On August 23, 1968, a damage claim was filed by plaintiff against Penn Central Railroad Company for the damage sustained by this shipment. On July 2, 1969, a letter was directed to Penn Central Railroad Company by plaintiff's insurer, Aetna Casualty and Surety Company, hereinafter referred to jointly with plaintiff as "claimant," enclosing additional documents in support of its claim and requesting payment thereof.

On January 20, 1970, claimant received a letter of declination from Penn Central. On January 30, 1970, claimant wrote to Penn Central questioning the declination and requesting payment of its claim.

Penn Central responded on June 11, 1970. This response, which did not refer to the previous declination, stated in part: "Claim is under investigation and we are tracing today for additional information before we can conclude our handling."

In response to a letter from claimant dated December 11, 1970, Penn Central wrote the claimant on December 22, 1970 stating in part, "Claim is presently with our Legal Department. We are tracing for immediate return and I will contact you further."

On March 18, 1971, claimant again wrote to Penn Central requesting the status of its claim and a settlement check.

On June 1, 1971, claimant received a computer printout from Penn Central dated May 25, 1971, entitled "Statement of Claim Account," which statement did not include the claim in question. Claimant wrote to Penn Central on June 4, 1971, requesting a settlement check and further stating "we might point out that your claim statement account dated May 25, 1971 does not show this claim as outstanding, and we ask why this is so."

In response to this letter, Penn Central wrote claimant on June 14, 1971, stating in part "Claim was withdrawn from open account in error. File

Plaintiff's Notice of Motion, etc.

is still with our Legal Department. We will finalize within 30 days."

Subsequently, claimant wrote several letters to Penn Central requesting the status of its claim and inquiring when a check might be expected. Claimant received a reply dated July 3, 1972 stating in part, "...we have urgently requested the return of the papers from our Mr. Zinger, Asst. General Counsel, and on receipt will advise you."

On March 12, 1973, because Penn Central was involved in reorganization proceedings, claimant's counsel wrote to CB&Q as the originating carrier of this shipment and issuer of the Bill of Lading, requesting payment of claimant's claim under Section 20(11) of the Interstate Commerce Act.

At some time between the date of the shipment in question and July 10, 1973, defendant Burlington Northern became successor to the interests of CB&Q.

This action was commenced in this Court by the service of a Summons and Complaint upon defendant on May 1, 1974.

Respectfully submitted,

SCHINDEL & COOPER
Attorneys for Plaintiff
450 Seventh Avenue
New York, N. Y. (10001)
(212) 244-6575

Judge R. Owen

The action was commenced on May 1, 1974 by the service of a Summons and Complaint upon the defendant, an interstate rail carrier subject to the jurisdiction of the Interstate Commerce Act. A copy of the Summons and Complaint is annexed hereto as

Plaintiff's Notice of Motion, etc.

Exhibit A. Plaintiff's complaint alleges that certain goods were entrusted by plaintiff to the Chicago, Burlington, and Quincy Railroad for transportation; that the goods were damaged while en route to the consignee; that plaintiff was thereby damaged in the amount of \$34,134.50; and that defendant at some time between the date of the shipment and the date of the complaint became successor to the interests of the Chicago, Burlington, & Quincy Railroad. Plaintiff contends that defendant is liable as a common carrier for the full amount of the damages sustained by plaintiff as a result of the said transportation.

Defendant's answer, hereto annexed as Exhibit B, was served upon plaintiff on or about June 20, 1974. In its answer, defendant asserts various general defenses to common carrier liability.

Plaintiff's position is that the only genuine issue raised by the pleadings herein and by all that transpired between the parties prior to the litigation is whether plaintiff's suit is barred by Section 20(11) of the Interstate Commerce Act and Section 2(b) of the Bill of Lading Contract, which require an action for damages to be brought within two years and one day from the date when notice is given by the carrier that the claim is disallowed.

Plaintiff's Notice of Motion, etc.

Plaintiff's motion is addressed primarily to its position that this suit is not barred by the aforementioned provisions. Plaintiff's position is based on two alternative theories: first, that the carrier's notice of disallowance was a qualified disallowance and was therefore insufficient to start the running of the limitations period; and alternatively, that the carrier's disallowance was later withdrawn or revoked by the carrier, such revocation or withdrawal putting the parties in the same position in which they would have been had the carrier never disallowed the claim.

Deponent realizes the complex nature of the legal question in issue and therefore submits a Memorandum of Law in support of plaintiff's position.

WHEREFORE, deponent, on behalf of defendant, respectfully prays that a Summary Judgment be rendered for plaintiff herein, for the full amount prayed for in the complaint, plus interest from the date of demand was first made upon defendant by plaintiff for such amount, together with the costs and disbursements of this action, and for such other and further relief as the Court may deem just and proper.

HYLAN COOPER

Sworn to before me this
17th day of April, 1975.

Defendant's Notice of Motion, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PRATT & WHITNEY AIRCRAFT, division of	:	
UNITED AIRCRAFT CORPORATION,	:	NOTICE OF
	:	<u>CROSS-MOTION</u>
Plaintiff,	:	
-against-	:	74 Civ. 1849
	:	Judge R. Owen
BURLINGTON NORTHERN INC.,	:	
	:	
Defendant.	:	
	:	

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S I R S :

PLEASE TAKE NOTICE, that upon the affidavit of Robert P. Shaughnessy, Esq., the exhibits annexed to plaintiff's motion for summary judgment and the pleadings and proceedings heretofore had herein, defendant will make a cross-motion before this Court on the 18th day of July, 1975 at 2:15 P.M. in the afternoon of that day, or as soon thereafter as counsel can be heard, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an order granting summary judgment to the defendant on the ground that there are no triable issues of fact and that this suit is barred by the applicable statute of limitations as a matter of law, and for such other and further relief as to the Court may seem just and proper.

Dated: New York, N. Y.
July 8, 1975

BLEAKLEY, PLATT, SCHMIDT & FRITZ

By Robert P. Shaughnessy
Attorneys for Defendant
Office & P.O. Address
120 Broadway
New York, N. Y. 10005
(212) 732-2000

TO: SCHINDEL & COOPER
Attorneys for Plaintiff
450 Seventh Avenue
New York, N. Y. 10001

Defendant's Notice of Motion, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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PRATT & WHITNEY AIRCRAFT, division of	:	STATEMENT PURSU-
UNITED AIRCRAFT CORPORATION,	:	ANT TO GENERAL
	:	RULE 9(g) RE DE-
Plaintiff,	:	FENDANT - CROSS-
	:	MOVANT
-against-	:	
BURLINGTON NORTHERN INC.,	:	74 Civ. 1849
	:	Judge R. Owen
Defendant.	:	
	:	

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There is no triable material issue of fact with respect to the following:

1. The claim for damage to this interstate shipment was disallowed in writing on January 20, 1970.
2. This suit for damage to the shipment was commenced May 1, 1974, which is more than two years and one day from disallowance of the claim.

Defendant takes issue with the following statement of facts set forth in plaintiff's Statement of Facts pursuant to Rule 9(z).

A. Inspection of the shipment on August 21, 1968 was by the Penn Central, the delivering carrier, and not by the CB&Q.

B. Penn Central's letter of June 11, 1970, was expressly in response to a letter from Aetna Casualty dated June 3, 1970 and not to Aetna Casualty's letter of January 30, 1970.

Dated: New York, N. Y.
July 8, 1975

BLEAKLEY, PLATT, SCHMIDT & FRITZ

By _____
Robert P. Shaughnessy
Attorneys for Defendant
Office and P.O. Address
120 Broadway
New York, N. Y. 10005
(212) 732-2000

Defendant's Notice of Motion, etc.

TO: SCHINDEL & COOPER
Attorneys for Plaintiff
450 Seventh Avenue
New York, N. Y. 10001

Defendant's Notice of Motion, etc.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- X

PRATT & WHITNEY AIRCRAFT, division of	:	
UNITED AIRCRAFT CORPORATION,	:	
	:	
Plaintiff,	:	<u>AFFIDAVIT</u>
	:	
-against-	:	74 Civ. 1849
	:	Judge R. Owen
BURLINGTON NORTHERN INC.,	:	
	:	
Defendant.	:	
	:	
----- X		

STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

ROBERT P. SHAUGHNESSY, being duly sworn, deposes and says:

I am a member of the firm of Bleakley, Platt, Schmidt & Fritz, attorneys herein for defendant Burlington Northern Inc., and a member of the bar of this Court.

I am familiar with the facts of this case and the proceedings heretofore had herein, my knowledge of the facts being based upon documents in the possession of both the plaintiff and defendant, copies of most of which documents have been attached as exhibits to plaintiff's motion for summary judgment.

This affidavit is submitted in opposition to plaintiff's motion for summary judgment and in support of defendant's cross-motion for summary judgment.

The affidavit submitted in support of plaintiff's motion for summary judgment has been made by Hylan Cooper, Esq., a member of the law firm of Schindel & Cooper. As the subject matter of the suit is a shipment which was made

Defendant's Notice of Motion, etc.

on August 7, 1968, by Electric Machinery Manufacturing Company from Minneapolis, Minnesota, which was consigned to Western Massachusetts Electric Company in West Springfield, Massachusetts, Mr. Cooper's knowledge of the matter is presumably based upon the documents contained in his file.

The shipment as mentioned was made on August 7, 1968. Apparently, the shipment sustained certain damage by fire during the transportation. On August 23, 1968, a written claim for damage was filed by plaintiff Pratt & Whitney Aircraft, division of United Aircraft Corporation, with the delivering carrier Penn Central Transportation Company (plaintiff's "Exhibit C"). A reading of "Exhibit C" discloses that it is a printed form made up by plaintiff for the purpose of filing claims, with appropriate spaces left for inserting the details of a particular claim. About 10 months later, on July 2, 1969, further information pertaining to the claim was sent to Penn Central by Aetna Casualty & Surety Company, the subrogated insurer (plaintiff's "Exhibit D"). On January 20, 1970, the Penn Central addressed a letter to Aetna Casualty disallowing the claim (plaintiff's "Exhibit G"). On May 1, 1974, this action was commenced, such date being over four years from the date of disallowance of the claim.

It is defendant's position that this suit is clearly barred by the statute of limitations because of the plaintiff's failure to commence suit within a two year and one day period subsequent to the disallowance of the claim on January 20, 1970. In any event, it is defendant's further position that plaintiff would not be entitled to summary judgment even if the suit had been timely filed for

Defendant's Notice of Motion, etc.

the reason that there is no showing of liability on the part of the defendant and no proof as to the extent and amount of plaintiff's damages.

WHEREFORE, it is respectfully requested that summary judgment be entered herein for defendant on the ground that this action is barred by the statute of limitations, that plaintiff's motion for summary judgment be denied in all respects and that the Court grant such other and further relief as it may deem just and proper.

Robert P. Shaughnessy

Sworn to before me this
8th day of July, 1975.

Notary Public

the property described below, in apparent good order, except as noted (contents and condition of contents of packages and destination as indicated below, which said carrier (the carrier being understood throughout this contract as the shipper) shall deliver to another carrier on the route to said destination. It is mutually agreed, as to each carrier of all or any of said property over all or any portion of said route to destination, and as to each party at any time interested in all or any of said property, that every service to be performed by the carrier shall be subject to all the terms and conditions of the Uniform Domestic Straight Bill of Lading set forth (1) in Official, Southern, Western and Illinois Freight Classifications in effect on the date hereof, if this is a rail or a rail-water shipment or (2) in the applicable motor carrier classification or tariff if this is a motor carrier shipment. Shipper hereby certifies that he is familiar with all the terms and conditions of the said bill of lading, including those on the back thereof, set forth in the classification or tariff which governs the transportation of this shipment, and the said terms and conditions are hereby agreed to by the shipper and accepted for himself and his assigns.

CARRIED BY CB & Q		CARRIER NO.
AT MINNEAPOLIS, MINNESOTA	DATE 8/7/68	SHIPPER'S NO. 67-1507
FROM ELECTRIC MACHINERY MFG. COMPANY		CUSTOMER'S ORDER NO. 767446
CONSIGNEE TO Western Massachusetts Electric Company Western Massachusetts Electric Co. Station Siding West Springfield, Massachusetts		
DESTINATION West Springfield, Massachusetts		
ROUTE CB & Q % PENN CENTRAL		
DELIVERING CARRIER		CAR INITIAL & NO. OTTX 91738

Subject to Section 7 of Conditions of applicable bill of lading. If this shipment is to be delivered to the consignee without recourse on the consignor, the consignor shall sign the following statement: The carrier shall not make delivery of this shipment without payment of freight and all other lawful charges.

ELECTRIC MACHINERY
MFG. COMPANY

(Signature of consignor)
If charges are to be prepaid, write or stamp here, "To be Prepaid."

Prepaid
Received \$
to apply in prepayment of the charges on the property described herein.

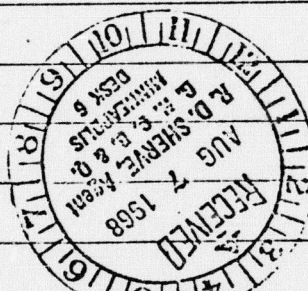
Agent or Cashier

Per:
(The signature here acknowledges only the amount prepaid.)

Charges Advanced:

PROTECT LCL OR CARLOAD
WHICHEVER CHEAPER

No. Packages	Kind of Package, Description of Articles, Special Marks, and Exceptions	WEIGHT Sub. to Car.	Class Item No.	No. Packages	Kind of Package, Description of Articles, Special Marks, and Exceptions	WEIGHT Sub. to Car.	Class Item No.
	Electric Motor Generator Set		62120 34760		Electro-Magnetic Slip Couplings (Skd.)		61800 34630
2	Electric Generator Complete		62120 34760		Bdles. Baseplates Gen. or Motor over 50 lbs.		60660 34990
	Electric Generator Armature Ring (Skd.)		62120 34760		Pedestal (Skd.)		62120 34760
	Electric Generator Rotor (Skd.)		62120 34760		Boxes Electric Controllers		61480 34500
5	Boxes Electric Generator Parts over 5lbs.		62120 34760		Boxed Cans Transformer Oil		155350 77240
Dunnage 1500 #				Canvas Covered			
Mark - P.O. 767446							
W.O. # 820114							



*If the shipment moves between two ports by a carrier by water, the law requires that the bill of lading shall state whether it is carrier's or shipper's weight.
NOTE—Where the rate is dependent on value, shippers are required to state specifically in writing the agreed or declared value of the property.
The agreed or declared value of the property is hereby specifically stated by the shipper to be not exceeding

18491

This is to certify that the above named articles are properly described, and are packed and marked and are in proper condition for transportation according to the regulations provided by the Interstate Commerce Commission.

The fibre boxes used for this shipment conform to the specifications set forth in the box maker's certificate thereon, and all other requirements of Uniform Freight Classification.

ELECTRIC MACHINERY MFG. COMPANY, Shipper

Per **E. A. Halmgren**
Permanent postoffice address of shipper, Minneapolis, Minn., U.S.A. 55413

1

Agent
Per

"Shipper's Imprint in lieu of stamp: not a part of bill of lading approved by the Interstate Commerce Commission." All items described on this bill may contain other items rated same or lower.

Claim Letter

Pratt & Whitney Aircraft

DIVISION OF UNITED AIRCRAFT CORPORATION



August 23, 1968

Penn Central Railroad Company
Union Station
Springfield, Massachusetts

Claim PWA 1829

Attention: Claim Agent

Gentlemen:

The following shipment has (been damaged
(been short delivered
(not been delivered

RECEIVED

LRC

RGH

CAM

HRI

MAY 20 1969

INSURANCE DEPT.

Claim is hereby entered against you in accordance with the provisions of Section No. 2(b) of the contract terms and conditions of the Uniform Domestic Straight Bill of Lading and/or Section No. 7 of the Uniform Express Receipt.

The exact amount of the claim and the necessary supporting documents will be furnished you at a later date.

Shipper: Electric Machinery Mfg. Company, Minneapolis Minn.
Consignee: Western Massachusetts Electric Co., West Springfield, Mass.

Route: CB&P Penn Central

Destination Carrier: Penn Central

Bill of Lading No. 18491

Our Purchase Order No. 767446

Waybill No. CAR NO. OTTX 91738
dtd 8-7-68

Amount Shipped:

Amount Received:

Weight:

Extent of Damage: unknown

Please acknowledge receipt of this claim, addressing your acknowledgment to the attention of the undersigned and indicating your claim number.

Very truly yours,

UNITED AIRCRAFT CORPORATION
Pratt & Whitney Aircraft Div.

D. Bruce Belcher
Traffic Department

ph
mjt

BEST COPY AVAILABLE

July 2, 1969

Mr. Cechinni
Freight Claim Dept.
Penn Central Railroad Co.
Penn Central Terminal
Buffalo, New York 14212

RE CLAIMANT CODE 4618-0527 PRATT & WHITNEY AIRCRAFT
AETNA CLAIM 7 IM 180060

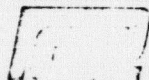
Dear Mr. Cechinni:

We refer to Pratt & Whitney Aircraft letter of claim dated 8/23/68 formally filing claim with the Penn Central Railroad on this shipment damaged by fire at Niverville, New York, enroute to Pratt & Whitney Aircraft. Repairs to the generator have now been completed and we attach a complete set of documents in support of the claim in the amount of \$34,134.50.

Please conduct your usual investigation and in due course forward to us your settlement draft in the amount of \$34,134.50.

Very truly yours,

L. F. Little
Marine Claim Department

Declination Letter**PENN CENTRAL COMPANY**

PENN CENTRAL TERMINAL
BUFFALO, NEW YORK 14212

J. H. MAITRE
MANAGER-CLAIM ACCOUNTS
W. L. CAMPBELL
ASST. MANAGER-CLAIM ACCOUNTS
N. R. BERNER
ASST. MANAGER-CLAIM ACCOUNTS

January 20, 1970d

Claim: V-0105-0020-7-IM-180060

Mr. L. F. Little
Marine Claim Department
The Aetna Casualty & Surety Co.
151 Farmington Ave.
Hartford, Conn. 06115

Dear Mr. Little:

Referring to the above numbered claim originally filed by your insured, the Pratt & Whitney Aircraft Corp., Hartford, Conn., in the amount of \$34,134.50.

Aside from discovery of the fire, our investigation does not indicate any irregularities in the handling of this consignment. Examination of car established that brakes and journals had functioned properly, a factor which might otherwise have related the incident to carrier negligence. After extensive investigation by our Security Department, the cause of fire remains unknown.

Considering the natural hazard of exposure to the elements and the absence of carrier negligence, I regret that I am not at liberty to volunteer responsibility for damages claimed. Under the circumstances, it is my unpleasant duty to advise that claim is respectfully disallowed.

Very truly yours,

W. L. Campbell
W. L. Campbell

Assistant Manager - Claim Accounts
PENN CENTRAL TRANSPORTATION CO.

70
JAN 21 1970
CLERK

January 30, 1970

Mr. W. L. Campbell
Assistant Manager - Claim Accounts
Penn Central Company
Penn Central Terminal
Buffalo, New York 14212

Dear Mr. Campbell:

CLAIM: V-0105-0020, PRATT & WHITNEY AIRCRAFT CORPORATION,
AETNA CLAIM 7 IM 180060

We cannot accept the denial of liability contained in
your letter of January 20, 1970.

In fact, it is difficult to understand how you can take
such a position in view of the fact the shipment was
destroyed by fire while in the care, custody and control
of the Penn Central Company. Surely you must realize
the absence of negligence is no defense to a common carrier.
Such a carrier is an insurer of goods not only by reason
of Federal Statutes, but also under the Common Law.

We trust you will reconsider your untenable position and
forward to us your draft in the amount of \$34,134.40. Claim
has now been pending for seven months and we would appreciate
a prompt settlement.

Very truly yours,

L. F. Little
Property Claim Department
paw

PENN CENTRAL

June 11, 1970A

J. H. MAITRE
MANAGER-FREIGHT CLAIMS
W. L. CAMPBELL
ASST. MANAGER-FREIGHT CLAIMS
N. R. BERNER
ASST. MANAGER-FREIGHT CLAIMS
D. J. SOLAR
ASST. MANAGER-FREIGHT CLAIMS
PENN CENTRAL TERMINAL
BUFFALO, NEW YORK 14212

Claim: V-0105-0020-71M180060-RG

Mr. W. H. Allen
Aetna Life & Casualty
151 Farmington Avenue
Hartford, Conn. 06115

Dear Mr. Allen:

Your letter of June 3, 1970 file above, United Aircraft Corp.
claim \$34,134.40.

Claim is under investigation and we are tracing today for additional information before we can conclude our handling.

Very truly yours,

DJ Solar
D. J. Solar,
Asst. Manager-Freight Claims

RECEIVED
JUN 16 1970
Prop. *W. H. Allen*

PENN CENTRAL

PENN CENTRAL STATION
BUFFALO, N. Y. 14212

December 22, 1970 A

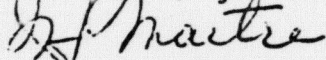
Mr. W. H. Allan
Senior Examiner
HO Property Claim
Aetna Life & Casualty
Hartford, Conn. 06115

Dear Mr. Allen:

Referring to claim V-0105-0020 your file 7 IN 180060 (United Aircraft Corp.-Pratt & Whitney) for \$34,134.50.

Claim is presently with our Legal Department. We are tracing for immediate return and I will contact you further.

Yours very truly,



J. H. Maitre
Sr. Claim Account Representative

RECEIVED
DEC 29 1970
Prop. Claim

PENN CENTRAL TRANSPORTATION COMPANY

Statement of Claim Account


PENN CENTRAL TRANSPORTATION COMPANY NY

 FCD - 16 R-2
6-70

• BUFFALO, N. Y. 14212

PRINTED IN U.S.A.

CLAIMANT CODE NO.

0105-0020

TO

 AETNA CASUALTY & SURETY
HARTFORD CONN

STATEMENT OF CLAIM ACCOUNT

YOUR CLAIM NUMBER	AMOUNT CLAIMED	DISPOSITION		YOUR CLAIM NUMBER	AMOUNT CLAIMED	DISPOSITION	
		PAID	C			PAID	C
IC 23	816.00		2	01 910307 M5	1370.18		
01 915766 M5	100.85			01 945041 M5	501.13		
01 945042 M5	218.44			01 945043 M5	559.39		
01 945044 M5	247.50						
				RECEIVED JUN 1 1971 Prop. Claim			
1 - PAID BY VOUCHER 2 - WITHDRAWN FROM ACCOUNT 3 - PAID BY SPECIAL DRAFT		THIS STATEMENT IS AN ACKNOWLEDGMENT OF TRANSACTIONS TO YOUR ACCOUNT.		1			
MONTH DAY YEAR DISPOSITION CODE				SHEET NO.		DRAFT NUMBER	
						DRAFT TOTAL	

MANAGER FREIGHT CLAIMS

June 4, 1971

Mr. J. H. Maitre, Senior Claim Account Representative
Penn Central Railroad
Penn Central Terminal
Buffalo, New York 14212

Dear Mr. Maitre:

YOUR CLAIM V-0105-0020, OUR FILE 7 IM 180060, UNITED AIRCRAFT
CORPORATION, CLAIM \$34,134.40

We would appreciate an acknowledgment of our letter of
March 18 concerning this claim which has been in your
hands since July 2, 1969.

It would seem sufficient time has elapsed to allow you
to complete your investigation, and we hope you will let
us have your check in settlement at this time.

We might point out that your claim statement account dated
May 25, 1971, does not show this claim as outstanding, and
we ask why this is so.

Very truly yours,

W. H. Allen, Senior Examiner
Property Claim Department
jsh

**PENN CENTRAL TRANSPORTATION COMPANY**

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES

PENN CENTRAL STATION
BUFFALO, N. Y. 14212

June 14, 1971 JHM/a

Mr. W. H. Allen
Senior Examiner
Property Claim Dept.
151 Farmington Ave.
Hartford, Conn. 06115

Dear Mr. Allen:

Thank you for your letter of June 4 concerning claim V-1015-0020
your file 7 IM 180060 for \$34,134.50.

Claim was withdrawn from open account in error. File is still
with our Legal Department.

We will finalize within 30 days.

Very truly yours,

J. H. Maitre
Sr. Claim Account Representative

RECEIVED

JUN 16 1971

Prop. Claim

September 20, 1971

Mr. J. H. Maitre, Senior Claim Account Representative
Penn Central Transportation Company
Penn Central Station
Buffalo, NY 14212

Dear Mr. Maitre:

YOUR CLAIM V-1015-0020, OUR FILE 7 IM 180060, UNITED AIRCRAFT
CORPORATION, CLAIM \$34,134.50

Your letter of June 14 stated you would finalize this claim
within thirty days.

To date, we have had no further word and would appreciate
your advices as to when we may expect settlement.

Very truly yours,

W. H. Allen, Senior Examiner
Property Claim Division
mmc

December 22, 1971

Mr. J. H. Maitre
Senior Claim Account Representative
Penn Central Transportation Company
Penn Central Station
Buffalo, NY 14212

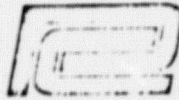
Dear Mr. Maitre:

YOUR CLAIM V-1015-0020, OUR FILE 7 IM 180060, UNITED AIRCRAFT
CORPORATION, CLAIM \$34,134.50

Please inform us when we may expect your check in settlement of
this claim.

Yours truly,

W. H. Allen, Senior Examiner
Property Claim Division
hp

**PENN CENTRAL TRANSPORTATION COMPANY**

GEORGE P. BAKER, RICHARD C. BOND, JERVIS LANGDON, JR., WILLARD WIRTZ, TRUSTEES

PENN CENTRAL STATION
BUFFALO, N. Y. 14212

July 3, 1972 EHS/tjr

Claim No. V-1015-0020-7-IM-180060

Mr. M. J. Peters
Claim Department Property Div.
Aetna Life & Casualty
151 Farmington Ave.
Hartford, Conn. 06115

RECEIVED

JUL 6 1972

Drop. Claim

Dear Mr. Peters:

In acknowledgement of your letter June 19, 1972 covering above claim by United Aircraft Corp. in amount \$34,134.50, we have urgently requested the return of the papers from our Mr. Zinger, Asst. General Counsel, and on receipt will advise you.

Again we regret this delay.

Very truly yours,

E. H. Steinman,
Claim Account Representative

LAW OFFICES

SCHINDEL & COOPER

KALMAN S. SCHINDEL
HYLAN COOPER
ANDREW M. SCHINDEL
STEPHEN F. SCHINDEL

450 SEVENTH AVENUE, NEW YORK, N. Y. 10001

212 244-6575

March 12, 1973

Director Freight Claim
Chicago, Burlington & Quincy Railroad Co.
176 East 5th Street
St. Paul, Minnesota 55101

Re: United Aircraft Corporation
Penn Central Claim File No. V 1015-0020
Amount: \$34,134.50
Date of Shipment: 8/7/68
Our File: P-6

Dear Sir:

This office represents Pratt & Whitney Aircraft, division of United Aircraft Corporation in connection with the captioned claim.

This claim arose out of the shipment of two skids electric generators and five boxes of electric generator motor parts on August 7, 1968 from Electric Machinery Manufacturing Company, Minneapolis, Minnesota to Western Massachusetts Electric Company, West Springfield, Massachusetts. The bill of lading was issued by the Chicago, Burlington & Quincy Railroad Company. Delivery was to have been made by the Penn Central Railroad. The shipment was damaged by fire while in route to West Springfield, Massachusetts. Claim was filed against Penn Central Railroad and correspondence has been continuing.

Because of the reorganization proceedings in which Penn Central is now involved, it has now been decided to pursue this claim against the originating carrier, the Chicago, Burlington & Quincy Railroad as is the claimant's right under Section 20(11) of the Interstate Commerce Act.

We enclose herewith various documents concerning this claim. By copy of this letter we are requesting the Penn Central Railroad

SCHINDEL & COOPER

Director Freight Claim
March 12, 1973
Page 2

to forward to you its complete claim file together with the usual waivers.

It would be appreciated if you would advise this office, at your earliest convenience, the position you intend to take with regard to this claim.

Very truly yours,

SCHINDEL & COOPER

Stephen F. Schindel

SFS:EM

cc: Mr. D. J. Solar, Senior Claim Account Rep.
Penn Central Railroad

BURLINGTON NORTHERN

FREIGHT CLAIMS DEPARTMENT

176 East Fifth Street
St. Paul, Minnesota 55101
Telephone (612) 227-0911Schindel & Cooper
Attorneys at Law
450 Seventh Ave.
New York, NY 10001

July 10, 1973

Gentlemen:

Refer to your Claim T-6 regarding claim filed by Pratt & Whitney Aircraft, Division of United Aircraft Corporation, in the amount of \$34,134.50 with the Penn Central Company, and now filed with the Burlington Northern.


This claim was filed with the Penn Central Company and disallowed by the Penn Central Co. on January 20, 1970. On March 16, 1973, a letter from your firm was received by the Burlington Northern stating that it has been decided to pursue this claim against the originating carrier, the Chicago, Burlington & Quincy Railroad Company, now part of the Burlington Northern.

Section 2, Paragraph B of the bill of lading provides that:

"Suits shall be instituted against any carrier only within two years and one day from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice. Where claims are not filed or suits are not instituted thereon in accordance with the foregoing provisions, no carrier hereunder shall be liable, and such claims will not be paid."

Your letter refiling this claim with the Burlington Northern was not received within the time limit specified under the bill of lading contract, and payment of this claim would not be in keeping with the bill of lading contract.

Yours truly,


L. E. Hoskins
Director, Freight ClaimsBy: RC/H

RCH/21

Claim 785749-12

Opinion Below

MEMORANDUM AND ORDER

Defendant's motion for summary judgment is granted and the action is dismissed as time-barred. I deem the letter of Penn Central Company to the Aetna Casualty & Surety Company of January 20, 1970 to be an unequivocal disallowance of the claim, starting the running of the statute of limitations under the uniform bill of lading. Such negotiations as occurred thereafter are, as a matter of law, irrelevant under authorities I deem persuasive and binding upon me, B.A. Waltermann Co. v. Pennsylvania Railroad Company, 295 F.2d 627 (6th Cir. 1961); Burns v. Chicago M.St.P. & P. R.R. Co., 192 F.2d 472 (8th Cir. 1951); and Brewster v. Davis, 207 App. Div. 461 (4th Dept. 1924). I decline to follow John Morrell & Co. v. Chicago, Rock Island & Pacific Railroad Company, 495 F.2d 331 (7th Cir. 1974) for the reasons set forth in the dissent therein.

The foregoing is so ordered.

Submit judgment on notice.

(Sgd.) Richard Owen
United States District Judge

January 12, 1976

Order and Judgment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK



-----X
PRATT & WHITNEY AIRCRAFT, division of
UNITED AIRCRAFT CORPORATION,

Plaintiff

1849 20
74 CIV. 1894

-a- t-

BURLINGTON NORTHERN, INC.,

Defendant

ORDER
and
JUDGMENT

-----X

A motion having regularly been made by the plaintiff above named for an order for summary judgment in favor of the plaintiff herein for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law, and the defendant having made a cross-motion for an order for summary judgment in favor of the defendant herein against the plaintiff dismissing the complaint herein on the ground that there is no genuine issue in this case as to any

Order and Judgment

material fact and that the defendant is entitled to judgment against the plaintiff as a matter of law,

Now, on consideration of the pleadings in the action, the statements of facts of the parties, the affidavit of Hylan Cooper, dated April 17, 1975, in support of the motion, the affidavit of Robert Shaughnessy, dated July 8, 1975, in opposition to the motion and in support of the cross-motion and the written briefs of the parties, and after hearing the argument of counsel, due deliberation having been had, and upon filing the opinion of the court dated January 12, 1976 and filed January 14, 1976, it is hereby

ORDERED, that plaintiff's motion for summary judgment be and the same hereby is in all respects denied, and it is further

ORDERED, that defendant's motion be and the same hereby is granted, and it is further

ORDERED, ADJUDGED AND DECREED that the action be dismissed on the merits.

Dated: Sept. 8, 1976

DOCUMENT ENTERED - 9/13/76
Raymond F. Burghardt
CLERK

[Signature]
U.S.D.J.

MD

Notice of Appeal

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

PRATT & WHITNEY AIRCRAFT, div. of
UNITED AIRCRAFT CORPORATION,

Plaintiff

-against-

BURLINGTON NORTHERN, INC.,

Defendant

JUDGE OWEN

Index No.
74 CIV 1849

NOTICE OF
APPEAL

NOTICE IS HEREBY GIVEN that Pratt & Whitney Aircraft, division of United Aircraft Corporation, Plaintiff above named, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this action on the 13th day of September, 1976.

Dated: September 24, 1976

SCHINDEL & COOPER
450 Seventh Avenue
New York, New York 10001

ATTORNEYS FOR PLAINTIFF

Two 2

APPENDIX

Entered the 22nd day of Nov. 1976

Bleakly Platt Schmidt & Katz

DEFENDANT - APPELLEE